IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1116

THE UNITED STATES OF AMERICA *ex rel* JOHN C. McDERMOTT,
Petitioner,

—against—

ARTHUR G. JAEGER, United States Marshal for the Eastern District of New York, and E. E. THOMPSON, Warden of Federal Detention Headquarters, New York City,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

HOMER L. LOOMIS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of the relator above-named, on behalf of Guiseppe Ferrara, Luigi Rosato, Salvatore Piccaluga and Eusibio Cecearelli, defendants, respectfully allege and propounds as follows:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

I.

The petition for a writ of habeas corpus was filed by the above-named relator on behalf of Guiseppe Ferrara, Luigi Rosato, Salvatore Piccaluga and Eusibio Cecearelli, defendants, on the 21st day of May, 1941, and the writ was issued on the same day returnable on the 22nd day of May, 1941.

The petition (R. 3-4)* set forth in substance that the four defendants were held by Arthur G. Jaeger, United States Marshal for the Eastern District of New York, and by E. E. Thompson, Warden of the Federal Detention Headquarters in New York City, to answer an information filed in the District Court for the Canal Zone. And the petition substantially averred *inter alia* that the information charged no crime against the United States Government and presented no probable cause for believing the defendants guilty of the crime alleged.

The defendants were produced on the return day, at which time it was made to appear that the information (R. 12-13) filed in the Canal Zone as aforesaid, to answer which the prisoners were being held, was entitled "*The Government of the Canal Zone* vs. *Guiseppe Ferrara,*" *et al,* Defendants, and charged the said defendants with having damaged certain machinery of the Italian steamship Conte Biancamano with an intention to injure and endanger the safety of the said steamer and her cargo, in violation of Section 502, Title 18, United States Code, "against the peace and dignity of the Government of the Canal Zone."

It further appeared that the information was signed by Daniel E. McGrath, District Attorney for the Canal Zone, (R. 13) on the basis of the sworn testimony of witnesses

* This and similar notations refer to the pages of Transcript of Record filed herewith.

whose names were indorsed on the back thereof (R. 14).

2.

The United States District Judge before whom the writ was returned vacated the same on June 11, 1941, and ordered defendants remanded to the custody of the said Arthur G. Jaeger, United States Marshal.

An appeal was seasonably noticed and perfected in the United States Circuit Court of Appeals for the Second Circuit from the order vacating the writ. That court dismissed the appeal (R. 25 *et seq.*) substantially on the ground that the information charged an offense against the United States in a District of the United States; that, therefore, the arrest and detention of the prisoners was authorized by Section 591 of Title 18, United States Code; and that, since that was so, the relator had no right of appeal because of the Act of June 29, 1938, c. 806, 52, Stat. 1232, (U. S. C. A., Sec. 463).

3.

Petitioner feels aggrieved and complains of the proceedings had below for the following reasons:

a. The offense for which the prisoners were held to answer was one charged in the information to have been committed "against the peace and dignity of the Government of the Canal Zone" and, therefore, not an offense of the kind described in Section 591 of Title 18, United States Code;

b. The District Court for the Canal Zone is not a court of the United States within the meaning of Section 591 of Title 18, United States Code;

c. For either and both of the foregoing reasons Section 591 of Title 18, United States Code, furnished no authority for the arrest and detention of the defendants, and, in consequence relator's right to appeal was not cut off by

Section 463 of Title 28, United States Code; and

d. Under the Fifth Amendment of the Constitution, a condition precedent to the application of Section 591 of Title 18, United States Code, in the case of infamous crimes, such as was here alleged, is a presentment by a grand jury, for which further reason Section 463 of Title 28, United States Code, was ineffective to cut off relator's right of appeal.

B.

REASON RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on by petitioner for an allowance of the writ herein prayed for are that the Circuit Court of Appeals for the Second Circuit has:

1. Rendered a decision in conflict with the Fifth Amendment of the Constitution of the United States and with the weight of judicial authority;

2. In deciding important questions of general law, reached untenable conclusions on unsound premises and in a way that varies from the usual course of judicial decisions;

3. Decided important questions of federal law that have not been, but should be, settled by this Court;

4. Decided federal questions in a way that violates the Fifth Amendment to the Constitution of the United States and runs counter to the applicable decisions of this Court; and

5. So far departed from the customary course of judicial proceedings, as to call for the exercise of this Court's power of review and reversal.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit should be granted.

HOMER L. LOOMIS,
Counsel for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

INTRODUCTORY STATEMENT.

1.

REPORT OF OPINIONS BELOW.

The opinion of the Circuit Court of Appeals has not as yet been officially reported. That of the District Court is reported at

2.

JURISDICTION.

The judgment of the Circuit Court of Appeals dismissing the appeal was entered on the 23rd day of March, 1942, (R. 29).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended in the Act of February 13th, 1925, (43 Stat. 938; 28 U. S. C. A., Sec. 347).

3.

SPECIFICATIONS OF ERROR.

The specifications of error are set out in the Petition *supra* (p. 4).

B.

ARGUMENT.

SUMMARY OF ARGUMENT.

Petitioner was deprived of his right of appeal on the theory that such right had been cut off by the Act of June 29, 1938, c. 806, 52 Stat., 1232 (28 U. S. C. A., Sec. 463), which provided, among other things, "That there shall be no right of appeal from" a final order vacating a writ of habeas corpus in any "proceeding to test the validity of a warrant of removal issued *pursuant to the provisions of Section 591 of Title 18* or the detention pending removal proceedings." (Emphasis supplied).

Petitioner contends that the detention of the prisoners for removal must, if they were to be deprived of their right to appeal, as conferred by the same act (28 U. S. C. A., Sec. 463), have been "pursuant to the provisions of Section 591 of Title 18" of the United States Code; that their detention, to have been pursuant to such provisions, must have been

authorized thereby; and that their detention was not authorized by such provisions, since those provisions authorized such detention (1) only when the crime for which the accused were detained was an offense charged to have been committed against the United States, (2) only when the court in which they were to be tried was a court of the United States and (3) only when the crime for which they were held to answer, if an infamous one, was charged on the presentment of a grand jury, and since none of these conditions precedent were here present.

POINT I.

The Statute on Whose Authority the Petitioner's Appeal Was Dismissed by the Circuit Court of Appeals Has No Application to This Case.

A.

This is Not a Case Within the Purview of 18 U. S. C. A., Sec. 591, As to Which Alone the Right of Appeal is Abolished by 28 U. S. C. A., Sec. 463.

The statute in reliance upon which the Circuit Court of Appeals dismissed petitioner's appeal is the Act of June 29, 1938, c. 806, 52 Stat. 1232, (28 U. S. C. A., Sec. 463), amending the Act of February 13, 1925, c. 229, Sec. 6, 43 Stat. 940, which, as amended, reads in its pertinent portion as follows:

> "Review—(a) *By circuit courts of appeals; jurisdiction of circuit judge to issue writ.*—In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however*, That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal

issued *pursuant to the provisions of Section 591 of Title 18* or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had" (Last emphasis supplied).

The express verbiage of this statute shows that it is confined to appeals from orders in habeas corpus proceedings "to test the validity of a warrant of removal issued pursuant to the provisions of Section 591 of Title 18 or the detention pending removal proceedings."

The statute, therefore, leaves untouched and unaffected the right of appeal from any and all orders in any and all other habeas corpus proceedings.

"Pursuant to the provisions," means *authorized* by the provisions (*Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 301 U. S. 379). And the detention of the accused by the respondents was in no sense authorized by 18 U. S. C. A., Sec. 591; not even colorably.

1.

The Crime is Not Charged to Have Been Committed Against the United States.

A glance at the said Section 591 of Title 18, U. S. C. A.,—"pursuant to the provisions" of which, the warrant of removal must have been issued, to cut off the right of appeal,—shows that it applies only to those cases in which the offender is held to answer the charge of having committed a "crime or offense against the United States".

The accused were held, as the record shows, to answer the charge of having committed a *crime or offense against the Government of the Canal Zone.* (R. 12-13.)

The name of the plaintiff, preferring the charge, is "the

Government of the Canal Zone" (id. 12). And the charge is that they, the accused, in doing what they are alleged to have done, "did then and there commit the offense of Violation of Section 502, Title 18, United States Code, contrary to the law in such case made and provided and *against the peace and dignity of the Government of the Canal Zone*" (id. 13). (Emphasis supplied).

2.

The Removal Sought Was Not from One District to Another of the United States.

Counsel for respondents below conceded, that the Canal Zone is, for the purpose of these proceedings, foreign territory, not incorporated into, nor a part of, the United States of America, and therefore, not subject to the guaranties of the United States Constitution.

But, as will also be seen from a consideration of said Section 591 of Title 18 U. S. C. A.,—"pursuant to the provisions of" which the warrant of removal must have been issued, to cut off the right of appeal, under 28 U. S. C. A., Sec. 463,—the removals for trial therein contemplated are only removals as between different districts of the United States.

Thus, the only officials who can hold the offender for trial, under the provisions of the said statute (18 U. S. C. A., Sec. 591), are justices, judges, or commissioners of the United States, or chancellors or judges of supreme or superior courts, chief or first judges of common pleas, mayors of cities, and justices of the peace or other magistrates of one of the *States* of the *United States*. And they may be so held only "agreeably to the usual mode of process against offenders in such *States*."

It is, therefore, quite obvious that an offender could not be removed *from* the Canal Zone *to* the Eastern District of New York "pursuant to the provisions of Section 591 of Title 18." If the District Attorney in the Eastern District of New York wanted such an offender brought up *to* his

district *from* the Canal Zone, he would have to proceed by way of extradition; not 'pursuant to the provisions of Section 591 of Title 18." And, therefore, it appears quite clear that, since it is only in the case of warrants of removal there are "issued pursuant to the provisions of" this last-named section that the right of appeal is cut off, no right of appeal would be cut off in the case of similar proceedings brought in the Canal Zone for the removal of the appellants *from* that country *to* the Eastern District of New York.

But, if no offender can be removed pursuant to the provisions of Section 591 of Title 18 *from* the Canal Zone *to* the Eastern District of New York, logic, to say nothing of a becoming sense of comity, requires us to conclude that it is quite as impossible to conceive that Congress meant the provisions of Section 591 of Title 18 to be applicable to attempts made to remove offenders *from* the Eastern District of New York *to* the Canal Zone. It is inconceivable that Congress should have meant the statute to have a one-sided application as between the Eastern District of New York and the Canal Zone, applicable to offenders going, but not to offenders coming.

Furthermore, the express language of Section 591 of Title 18 shows that the proceedings therein contemplated shall be conducted "at the expense of the United States." Obviously this provision was inserted because of the fact that the proceedings contemplated were proceedings for the benefit of the United States. It could not have been the thought that the proceedings therein contemplated might be conducted for the benefit of some foreign country. Otherwise the provision would have been that the proceedings should be conducted at the expense of such foreign country.

Respondents' counsel below referred to no case in which removal, "pursuant to the provisions of Section 591 of Title 18", was ever utilized, as between the United States and any of its insular or other possessions.

The Courts below have thus, by their rulings, certainly introduced an innovation into our criminal jurisprudence.

That it is too, an unauthorized innovation, seems clear.

The Court of Appeals cited two cases, *Ex Parte Krause*, 228 Fed. 547, (W. D. Wash.), and *United States* v. *Haskins*, Fed. Cas. No. 15,322 (Cal.).

The first refused to hold an accused for removal from the State of Washington to the Territory of Alaska under what is now 18 U. S. C. A., Sec. 591.

And the second permitted removal under the same statute from the State of California to the then Territory of Utah.

Neither would seem to constitute an acceptable authority for the innovation here sanctioned.

3.

The Canal Zone Code Provides for Extradition, Not Removal, To and From That Possession.

The Canal Zone Code (Act of Congress of June 19, 1934, c. 667, 48 Stat. 1122) supports petitioner's view that the provisions of section 591 of Title 18 have never been, or been meant to be, made applicable by Congress to the Canal Zone.

Section I of the preamble of that Act provides that the laws embodied in the Canal Zone Code "shall, for all purposes, establish conclusively, and be deemed to embrace, all the permanent laws relating to or applying in the Canal Zone in force on the date of enactment of this act, except such general laws of the United States as relate to and apply in the Canal Zone."

Section 591 of Title 18, U. S. C. A. is *not* one of the laws *embodied* in the Canal Zone Code, either in name or in substance.

On the other hand, the Canal Zone does prescribe, with great particularity, the method to be employed for the transfer of offenders to and from the Canal Zone. And that method is *extradition*, not removal (Canal Zone Code, Sections 861-871).*

* The more pertinent of these sections follow:

Thus, Section 861 makes applicable, to the Canal Zone,

> "all laws and treaties relating to the *extradition of* persons accused of crime in force in the United States" (Emphasis supplied);

as well as

> "all laws relating to the *rendition* of *fugitives from justice* as between the several States and Territories of the United States" (Emphasis supplied).

Section 864 provides that, when an offender found in the Canal Zone is demanded by a State or Territory, he may be arrested for rendition "as provided in 5278 of the Revised Statutes of the United States (U. S. Code, Title 18, Sec. 662)." The Federal statute, thus referred to, is, the Court will observe, the United States Statute relating to extradition as between the States and Territories of the United States, which imposes the expense of the proceedings upon the State or Territory making the demand.

The said Section 864 of the Canal Zone Code provides, as the only mode for the arrest of the offender, that it be

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"861. Application of Laws and Treaties of United States.—All laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they are not in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several State and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes the Canal Zone shall be considered and treated as an organized Territory of the United States.

"862. Warrant for arrest of fugitives from State or Territory.—A magistrate may issue a warrant for the apprehension of a person charged in any State or Territory of the United States with having committed treason or felony who flees from justice and is found in the Canal Zone.

"863. Proceedings for arrest and commitment.—The proceedings for the arrest and commitment of a person so charged shall be in all respects similar to those provided in this title for the arrest and commitment of a person charged with a public offense committed in the Canal Zone, except that a certified copy of an instrument found, or other judicial proceeding had against him in the State or Territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

"864. Commitment pending arrest on warrant of Governor.—If, from the examination, it appears that the accused has committed the

"*upon the warrant of the Governor of the Panama Canal,* on the demand of the executive authority of the State or Territory in which the fugitive committed the offense, unless he gives bail as provided in the next section following, or until he is legally discharged" (Emphasis supplied).

This, of course, is the method of extradition by political authorities, not the method of removal by judicial warrant.

And Section 868 of the Canal Zone Code, it will be observed, provides that the offender "must be discharged from custody or bail" unless, within the time limited in his original commitment "he is arrested *under the warrant of the Governor*" (Emphasis supplied).

And Section 870 of the same Canal Zone Code provides that when such an offender is returned from a State or Territory of the United States to the Canal Zone, pursuant to the latter's demand, "the accounts of the person *employed by the Governor* to bring back such fugitive must be audited and paid out of the treasury of the Canal Zone" (Emphasis supplied).

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crime alleged, the magistrate by warrant reciting the accusation must commit the fugitive to the proper custody in that subdivision for such time, to be specified in the warrant, as the magistrate may deem reasonable to permit the arrest of the fugitive, as provided in 5278 of the Revised Statutes of the United States (U. S. Code, title 18, sec. 662), upon the warrant of the Governor of the Panama Canal, on the demand of the executive authority of the State or Territory in which the fugitive committed the offense, unless he gives bail as provided in the next section following, or until he is legally discharged."

"868. Discharge of person unless arrested on warrant of Governor.—The person arrested must be discharged from custody or bail unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the Governor."

"870. Accounts of person employed to bring fugitive back to Canal Zone.—When the Governor of the Panama Canal demands the surrender to the authorities of the Canal Zone of a fugitive from justice who has been found and arrested in any State or Territory of the United States or in any foreign country, the accounts of the person employed by the Governor to bring back such fugitive must be audited and paid out of the treasury of the Canal Zone."

It has been noted *supra* that section 864 of the Canal Zone Code expressly refers to Section 5278 of the Revised Statutes of the United States (U. S. Code, Title 18, Sec. 662)*, which is the United States Extradition Statute. No reference is found in any part of the Canal Zone Code to Section 591 of Title 18, United States Code Annotated.

Thus it appears quite clear that the only method contemplated or provided by Congress for the transfer, as between the Canal Zone and the United States, of persons found in one jurisdiction and wanted for trial on criminal charges in the other, is the method of *extradition, not* that of *removal "pursuant to the provisions of Section 591 of Title 18."*

Therefore, it must follow, that the arrest or imprisonment in the Eastern District of New York of one wanted for trial on criminal charges in the Canal Zone presents a case within the purview of 18 U. S. C. A., 662, not Section 591 of Title 18.

4.

An Indictment is a SINE QUA NON to a Case Within the Removal Statute, Where the Offense Charged is an Infamous Crime.

Below counsel for respondents argued that the Constitutional guaranty of indictment in the case of an infamous

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* This Extradition Statute of the United States reads as follows:

"662. Fugitives from State or Territory. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitives to the State or Territory making such demand, shall be paid by such State or Territory.

crime (Fifth Amendment) has *no* application to the Canal Zone; yet, at the same time, he invoked, for its benefit, a removal statute that can have no application save where that Constitution *does* apply.

We have shown *supra* (3-5) how the wording of the removal statute (18 U. S. C. A., Sec. 591) shows that it was meant to apply only to integral parts of the United States proper, those parts within the pale of the Constitution. Judicial authority confirms that view. The leading case, perhaps, on this particular point, is *Beavers* v. *Henkel*, 194 U. S. 73, where this Court so construed the removal statute, and pointed out the broad distinction between removal thereunder and extradition. It was said (83):

> "Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, *while here*" (removal under 18 U. S. C. A., Sec. 591) "*the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial*" (Emphasis supplied).

When the alleged offender is removed under section 591 of Title 18, "the full protecting power of the United States" goes with him. And that full protecting power must include the great charter that regulates its exercise, the Federal Constitution.

If, therefore, the Canal Zone, for all present purposes, is, as respondent's counsel argued below, foreign territory, not subject to Constitutional limitations, it must follow that the case here presented cannot be one within the provisions of 18 U. S. C. A., Sec. 591.

This Court in *Beavers* v. *Henkel, supra*, further pointed out that all removal proceedings under Sec. 1014 of the Revised Statutes (18 U. S. C. A., Sec. 591) are subject to the requirement of an indictment under the Fifth Amend-

ment of the Constitution (83-85). It was there said, after the quoting of that amendment, (84),

> "While many States in the exercise of their undoubted sovereignty, *Hurtado* v. *California*, 110 U. S. 516, have provided for trials of criminal offenses upon information filed by the prosecuting officer and without any previous inquiry or action by a grand jury, the national Constitution, in its solicitude for the protection of the individual, *requires an indictment as a prerequisite to a trial.* The grand jury is a body known to the common law, to *which* is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged" (Emphasis supplied).

Then, after quoting from Blackstone's discussion of the grand jury system, the opinion in *Beavers* v. *Henkel, supra,* discussed the meaning of the requirement of the Fifth Amendment, as applied to proceedings for removal under Sec. 1014 U. S. Rev. Stat. (18 U. S. C. A., Sec. 591). It stated (84-85):

> "The thought is that *no one* shall be subjected to the burden and expense of a trial until there has been a *prior inquiry and adjudication by a responsible tribunal* that there is probable cause to believe him guilty. But the Constitution does *not* require *two* such inquiries and adjudications. The government, having once satisfied the *provision"* (the Fifth Amendment) "for an *inquiry* and obtained an *adjudication by the proper tribunal"* (the grand jury) "of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. * * * And the place where such *inquiry must be had and the decision of a grand jury obtained* is the locality in which *by the Constitution* and laws the final trial must be had (Emphasis supplied).

And that exposition of the Fifth Amendment of the

Constitution, as applying to removal proceedings under 18 U. S. C. A., Sec. 591, has recently been reaffirmed by this Court in *United States* v. *Mulligan*, 295 U. S. 396, 400, where it was said (400):

> "It may not with perfect accuracy be said, as in some removal decisions it has been said or implied, that the indictment is evidence of the facts that it alleges. But it fulfills the *Constitutional requirement* (Amendment V), establishes probable cause (Amendment IV) and is itself authority to bring the accused to trial" (Emphasis supplied).

To present a case for the application *in limine* of 18 U. S. C. A., Sec. 591, it thus seems clear, there must under the Constitution be, in the case of an infamous crime, an indictment found in the demanding jurisdiction. This was wanting here.

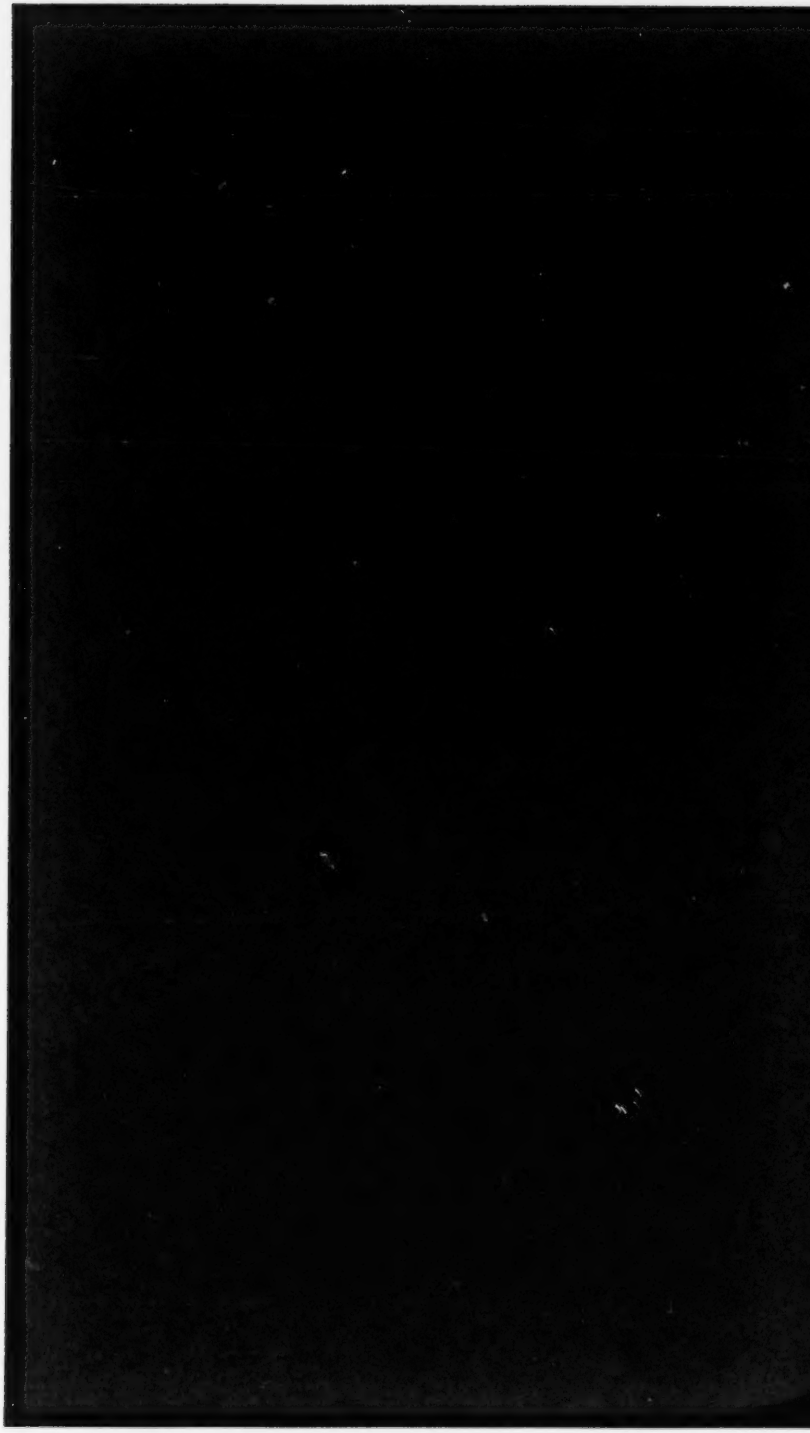
Accordingly, to recapitulate, 28 U. S. C. A., Sec. 463, as amended, cannot, in any respect, be effective here to cut off or impair the petitioner's right of appeal, since the conditions, upon which the applicability of that statute is predicated, are entirely wanting. No offense is charged against the United States; the removal is not sought from one District of the United States to another; the remedy is foreign to anything permissible under the Canal Zone Code; and the Constitutional basis, upon which alone the applicability of the removal statute can be predicated, is wanting.

POINT II.

The Writ of Certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Petitioner.



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No. 1116

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v.

ARTHUR G. JAEGER, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND E. E. THOMPSON, WARDEN OF FEDERAL DETENTION HEADQUARTERS, NEW YORK CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 25–28) is not yet reported. The district court opinion (R. 17–21) is reported at 39 F. Supp. 307.

JURISDICTION

The order of the circuit court of appeals dismissing the appeal was entered March 23, 1942 (R. 29). The petition for writ of certiorari was filed April 6, 1942. Although the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925 (Pet. 6) it seems clear that if jurisdiction is conferred upon this Court, it is not by that section but by Section 262 of the Judicial Code (28 U. S. C. 377). See 28 U. S. C. 463 (c); *In re 620 Church Street Corporation,* 299 U. S. 24, 26.[1]

QUESTIONS PRESENTED

1. Whether the circuit court of appeals had jurisdiction under 28 U. S. C. 463 (a) to entertain petitioner's appeal from the order of the district court discharging a writ of habeas corpus issued to test the validity of a removal proceeding, it being contended in the appellate court that the removal proceeding was unauthorized.

2. Whether the federal removal statute authorizes removal to the Canal Zone to answer an information filed in the United States District Court for the District of the Canal Zone in the name of the Government of that Zone, charging a violation of 18 U. S. C. 502, which interdicts tampering with a vessel entitled to engage in foreign commerce.

STATUTES INVOLVED

28 U. S. C. 463 (a) provides in part:

> In a proceeding in habeas corpus in a district court, * * * the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That

[1] It is doubtful, however, whether Section 262 applies. See footnote 6 *infra*, p. 9.

there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. * * *

18 U. S. C. 591 reads as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

STATEMENT

On May 20, 1941, petitioner filed in the United States District Court for the Eastern District of New York a petition for a writ of habeas corpus on behalf of four persons, Guiseppe Ferrara, Luigi Rosato, Salvatore Piccaluga and Eusibio Ceccarelli, alleging that they were arrested by the United States Marshal for the Eastern District of New York by virtue of a warrant issued by a United States Commissioner, based upon an information filed by the United States Attorney for the District of the Canal Zone and certain bench warrants, each bearing a *non est* return, issued by the United States District Court for the District of the Canal Zone; and that they were illegally imprisoned and restrained of their liberty by the respondents because the information referred to does not state a crime against the United States, there was no probable cause to believe they were guilty of the crime alleged in the information, and the District Court for the District of the Canal Zone was without jurisdiction "to find such information" and did not have jurisdiction over the crime charged therein (R. 3–5).

The court issued the writ, returnable May 22, 1941 (R. 2). On that date the respondent United States Marshal produced Ferrara, Rosato, Piccaluga and Ceccarelli before the court (R. 5) and submitted a copy of the "Minutes of Hearing in Removal Proceeding" before the Commissioner

(R. 6–11) and a copy of the information referred to in the petition (R. 12–13), which is designated in the record as "Exhibit Submitted by Government With Minutes on Hearing in Removal Proceeding" (R. 12). The information, filed April 8, 1941, in the United States District Court for the District of the Canal Zone, is entitled "The Government of the Canal Zone vs. Giuseppe Ferrara" et al. (R. 12, 14) and charged Ferrara, Rosato, Piccaluga, Ceccarelli, and five others with a violation of 18 U. S. C. 502—tampering with a vessel entitled to engage in foreign commerce—"contrary to the law in such case made and provided and against the peace and dignity of the Government of the Canal Zone" (R. 12–13). The minutes of the removal hearing held May 20, 1941 (R. 6), reveal that: (1) the Government elected "not to press these removal proceedings" against the five other defendants (R. 7); (2) the attorneys for Ferrara, et al., raised only one contention in the proceeding, namely, that the information did not state a violation of 18 U. S. C. 502 and therefore did not show probable cause for holding the defendants (R. 7, 8–10, 11); and (3) the United States Commissioner overruled the contention and held Ferrara, Rosato, Ceccarelli and Piccaluga for removal to the Canal Zone (R. 11).

The district court, on June 17, 1941, dismissed the writ of habeas corpus and remanded the four defendants to the custody of the marshal (R. 15–

16). An opinion was filed in which the court overruled petitioner's contentions that the defendants could not be removed to answer the information because the crime charged was an infamous one requiring an indictment under the Fifth Amendment (R. 19–21) and that the removal order was deficient because no evidence had been taken at the removal proceeding (R. 21).[2]

Petitioner's appeal was dismissed by the circuit court of appeals (R. 29) under 28 U. S. C. 463 (a), *supra,* pp. 2–3, which prohibits an appeal from an order "in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings" (R. 28).

ARGUMENT

Petitioner asserts (Pet. 6–8) that an appeal from an order discharging a writ of habeas corpus

[2] The court stated that another ground urged as to the invalidity of their detention—that the statute conferring jurisdiction upon the District Court of the Canal Zone did not give that court jurisdiction over offenses under 18 U. S. C. 502—was "no longer urged," as the Government's brief made it clear that the power was conferred by the Act of June 15, 1917, c. 30, 40 Stat. 231, and that the omission of reference to this offense in "the United States Code" was due to a printing error (R. 19). The court undoubtedly refers to the United States Code Annotated, since the code printed by the Government Printing Office (1934 ed.) specifically mentions Section 502 (18 U. S. C. 574).

is not prohibited by 28 U. S. C. 463 (a) (*supra*, pp. 2–3) unless the removal proceeding is authorized by 18 U. S. C. 591 (*supra*, p. 3). Upon this assumption he contends that the removal proceeding was not authorized by 18 U. S. C. 591 because: (1) the information did not charge an offense committed against the United States (Pet. 3, 8–9); (2) the removal was not from one district to another (Pet. 3, 9–11); (3) the Canal Zone Code provides for extradition, not removal (Pet. 11–14); and (4) the return of an indictment is, under the Fifth Amendment, a condition precedent to removal proceedings under 18 U. S. C. 591 (Pet. 4, 14–17).

1. It should be observed that, as was indicated by the circuit court of appeals (R. 26), there can be no doubt that the defendants were taken into custody under color of the authority granted by the removal statute, and that there was no suggestion by petitioner either in the hearings before the Commissioner or in the District Court that the "proceedings were not 'removal proceedings'" under 18 U. S. C. 591. To us it seems sufficient under the proviso in 28 U. S. C. 463 (a) to bar an appeal from an order dismissing a writ of habeas corpus to test the validity of a removal proceeding that the proceeding is instituted "pursuant" to 18 U. S. C. 591, even though it may not be actually "author-

ized"[3] by that section.[4] The avowed purpose of Congress in enacting the proviso was to "preclude any appeal from the order dismissing the writ of habeas corpus and remanding the prisoner for removal" (H. Rep. No. 1543, 75th Cong., 1st sess., p. 3). If the Government's construction of the proviso were not correct the door would be opened to numerous appeals, with that consequent delay in removal which the proviso was designed to prevent (H. Rep. No. 1543, *supra,* pp. 1, 2; see also S. Rep. No. 1943, 75th Cong., 3d sess.). Presumably Congress thought that the sifting process of habeas corpus would sufficiently protect against any grave injustice and that the desideratum of expeditious removal was the paramount consideration.[5] We

[3] Petitioner asserts that the words "pursuant to the provisions" contained in the proviso of the statute mean "authorized by the provisions," citing *Old Colony Trust Co.* v. *Comm'r*, 301 U. S. 379 (Pet. 8). But in that case the Court stated that "'Pursuant to' is defined as 'acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according'" (p. 383). Obviously, the use of any of these definitions in the statute in place of "pursuant to" would not impel the interpretation which petitioner assumes. As this Court stated in *Old Colony Trust Co.* v. *Comm'r, supra*, "The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary" (p. 383).

[4] The court below found it unnecessary to determine this question because it was of the view that the removal was authorized by 18 U. S. C. 591 (R. 26–27).

[5] The present case, in which the writ of habeas corpus was discharged by the District Court nearly a year ago, well illustrates the delay which would result if an appeal were permitted in any case.

therefore are of the view that the appeal did not lie despite the contentions of petitioner that 18 U. S. C. 591 did not sanction the removal proceeding.[6]

2. But even if we are wrong in our interpretation of the statute, the dismissal of the appeal was nevertheless proper and presents no question worthy of review by this Court. The circuit court of appeals has adequately answered petitioner's contentions on their merits (R. 27–28), showing that the crime charged by the information is a crime against the United States irrespective of the "procedural entitlement of the case" (R. 27), upon which petitioner relies (Pet. 8–9); that the removal of the offenders to the jurisdiction of the United States District Court for the District of the Canal Zone is a removal from one district to another and not a removal to "some foreign country" (Pet. 9–10); and that extradition is not required merely because the removal statute is not reprinted in the Canal Zone Code, as petitioner contends (Pet. 9–14).[7] As the court below held

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[6] Since the purpose of 28 U. S. C. 463 (a) was presumably to bar any appellate review, it is doubtful whether this Court would have jurisdiction under Section 262 to review the action of the circuit court of appeals in dismissing the appeal.

[7] Petitioner's argument that the removal proceedings were invalid because the offenders were held to answer an information and not an indictment, was disposed of by the trial court on the grounds (1) that the removal statute "makes no distinction between an indictment and an Information as the basis for arrest or removal," (2) the indictment requirement of the Fifth Amendment is inapplicable to the

(R. 27), "The case therefore falls squarely within the provisions of 18 U. S. C. § 591."

CONCLUSION

The appeal was properly dismissed by the circuit court of appeals. No conflict of decisions or important question of law is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
MELVA M. GRANEY,
W. MARVIN SMITH,
Attorneys.

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Canal Zone, and (3) that, in any event, the question is one which is more properly determined by the court where the trial is to be had (R. 18–21).

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